

Supreme Court of the United States

OCTOBER TERM, 1946

No. 91

E. I. DU PONT DE NEMOURS AND COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the
Southern District of New York.

APPELLANT'S SUPPLEMENTARY BRIEF CALLING ATTENTION TO NEW MATTER.

When this matter was argued before this Court, appellant du Pont sought to focus attention upon the slender thread by which the District Court found du Pont to have joined the extensive world-wide conspiracy and combination in titanium pigments, namely, the two letters printed at pages 121-4 of our main brief in No. 91. The Government refused to meet this issue squarely in its briefs or on oral argument, but rather by parade of all the evidence sought to create the impression that the District Court found that du Pont joined the conspiracy in some other manner. (Cf. Brief for the United States Nos. 90, 91)

This supplementary brief is submitted in view of a statement which has just come to the attention of counsel, made by the United States in another antitrust proceeding, which specifically recognizes that du Pont was in fact found by Judge Rifkind to have entered into the conspiracy on the

basis of the above two letters and those two letters only. The statement is as follows:

General Electric employs this same argument to minimize the Government's direct evidence of conspiracy. General Electric emphasizes the small number of documents produced by the Government (p. 123) and undertakes to have the Court disregard them by comparing them with the great mass of testimonial assertions of General Electric witnesses as to "policy," denials of conspiracy, protestations of active competition. The direct evidence of conspiracy is a substantial body of documents, "cinematographic photographs" of purpose and intent *in action*. But further, there is confirmation of these purposes, for the written expressions of purpose were carried out and the conspiracy therefore can be traced both forward and backward. We have discussed these documents in our main brief. They must be considered together, not piecemeal. By this most obvious and requisite treatment of evidence, Judge Rifkind, in the *National Lead* case, found that a great industrial corporation, Dupont, conspired to join a great international titanium cartel, from TWO LETTERS. Only one was written by Dupont. The other was from the addressee, National Lead, to I. G. Farben with a copy to Dupont. The copy, however, was not even found in Dupont's files. From these two letters Judge Rifkind found conspiracy even though on this issue he declared that as to Dupont (63 F. Supp. at page 527):

• • • the facts are by no means as clear. Stoutly it denies any complicity in the combination; and much of the evidence supports its denial, • • •

In sharp contrast with *National Lead*, Dupont exhibited, from the very beginning of its interest in titanium, an alert consciousness of the antitrust laws and moved cautiously and under the guidance of trained antitrust lawyers. The question is whether it succeeded in avoiding not only the form but also the substance of transgression.

In its letter to *National Lead*, Dupont pointed out that it was intent upon obeying the antitrust laws (63 F. Supp. 513, note 11) and would not make any com-

mitments as to territories but assured National Lead that in result affairs "will be eminently satisfactory to your foreign associates." National Lead then wrote to I. G. Farben sending a copy of the Dupont (Krebs Pigment & Color Corp., an affiliate) letter and saying that careful reading of the letter "will surely indicate to you the spirit in which they are entering into this contract and their efforts to meet your views. We feel that experience will prove that such will be the case." Upon the strength of these two letters, and expressly finding that Dupont was bound by the second letter, Judge Rifkind found that: "as to territorial delimitations of the titanium pigment business, Dupont joined the combination." (Reply Brief for the United States, filed in the District Court of the United States for the District of New Jersey, in *United States v. General Electric Company*, Civil Action No. 1364, Pages 21-3).

We call attention to the fact that this statement was made on January 10, 1947, immediately prior to the argument in this case before this Court.

We also call attention to the fact that this statement evidences the intention of the United States to use the decision of Judge Rifkind in the District Court below as authority for broadening and extending the conspiracy doctrine beyond previous limits in a manner which, as we suggested in this Court, will undermine the traditional rules which in the past have protected the rights of persons accused of conspiring against the law.

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